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No. 88-472

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALFRED G. BIBERFELD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under *McNally* v. *United States*, No. 86-234 (June 24, 1987), petitioners, who obtained government contracts by means of fraudulent misrepresentations as to where the goods would be manufactured, were properly convicted of wire fraud.

2. Whether the court below correctly held that the government contracts at issue unambiguously required the submission of the information that petitioners misrepresented.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1988. A rehearing petition was denied on August 12, 1988. The petition for a writ of certiorari was filed on September 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted on one count of conspiring to defraud the Defense Logistics Agency (DLA) and the Veterans Administration

(VA), in violation of 18 U.S.C. 371 (Count 1); four counts of wire fraud, in violation of 18 U.S.C. 1343 (Counts 2-5); five counts of making false statements in five separate contracts submitted to the DLA, in violation of 18 U.S.C. 1001 (Counts 6-10); and two counts of making false claims for payments under two separate DLA contracts, in violation of 18 U.S.C. 287 (Counts 11-12). Petitioner Biberfeld was sentenced to a total of five years' imprisonment[1] and was ordered to pay $84,000 in fines. Petitioner Surgical Instrument Company of America (SICOA) was fined a total of $50,000.[2]

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A2-A4), proved that petitioners devised a scheme to defraud the United States in connection with the sale of surgical instruments. Among other actions, petitioners omitted from their bids for VA and DLA contracts the fact that the surgical instruments they intended to sell the government would be manufactured in Pakistan, in violation of the Buy American Act, 41 U.S.C. 10a-10c.

The Department of Defense and the VA procure surgical instruments through competitive bidding. The Defense Department manages the bid process through the DLA. As the Defense Department requires surgical instruments, the DLA solicits bids from potential contractors,

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[1] Biberfeld was sentenced on each count as follows: Count 1, five years' imprisonment; Counts 2 through 4 and 6 through 12, five years' imprisonment, each sentence to run concurrently with each other and to the sentence on Count 1; Count 5, five years' imprisonment, which was suspended, and a three year period of probation to run consecutively to the sentence of five years' imprisonment.

[2] SICOA was ordered to pay $10,000 on each of Counts 1, 2, 6, 11, and 12, and was sentenced to pay a $10,000 concurrent fine on Counts 3, 4, 5, 7, 8, 9, and 10.

reviews and compares them, and then awards a contract. The VA purchases surgical instruments in a similar manner. Like the DLA, the VA requires bidders to list in their submissions each location where the product will be manufactured. A bidder must certify the country of origin of the goods the government seeks to purchase and list all places where work will be performed so that the DLA and the VA may determine the competitive position of the bidder under the Buy American Act, which gives a preference to United States businesses and to businesses located in NATO countries. In addition, the VA sets aside certain contracts for small businesses located in the United States. Incorrect or false certifications preclude a particular company from being awarded a contract. Pet. App. A2-A3.

In 1979, petitioner Biberfeld arranged for his wholly owned company, petitioner SICOA, to import from a West German company, Perfect Chirugical Instruments (Perfect), surgical instruments that were manufactured, for the most part, in Pakistan. Thereafter, SICOA obtained several DLA contracts to supply surgical instruments and used Perfect in West Germany as a conduit for instruments produced by a firm in Pakistan named G.T. Surgical Limited (G.T.). Perfect marked the instruments "SICOA-stainless Germany" and delivered them to petitioners in the United States. Petitioners inspected them and then delivered them to the DLA as if they had been produced in West Germany. Pet. App. A2-A3.

Similarly, petitioners obtained a VA contract for suture needle holders, certifying that the instruments would be made in West Germany. Petitioners ordered the finished instruments from G.T. in Pakistan, directing G.T. to stamp the instruments "lightly." Petitioners then erased the Pakistani markings and replaced them with the marking "Stainless Steel – SICOA – Germany" before sending

the instruments to the VA. Those instruments were shipped by G.T. directly to SICOA in the United States. Pet. App. A3-A4.

On a VA small business set-aside contract for forceps, SICOA bid in part as a "small business," and thus was required to manufacture a segment of the goods in the United States. Petitioners certified that SICOA's plant in New Jersey would be the principal manufacturing site for the instruments. Contrary to SICOA's representation, petitioners had G.T. send finished, but unmarked, instruments from Pakistan, instructing G.T. to list on the invoice that the instruments were "semi-finished instruments." Thereafter, petitioners marked the instruments and supplied them to the VA as SICOA instruments. Pet. App. A4.

The wire fraud counts in the indictment alleged schemes to defraud the DLA and the VA in the performance of their governmental functions by obstructing their procurement processes, thereby obtaining money under fraudulently obtained government contracts (Indictment 9, 21-22). On appeal, petitioners argued that their convictions should be reversed under this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), where the Court held that the mail fraud statute, 18 U.S.C. 1341, protects only property rights and not the intangible right of the citizenry to good government.

2. The court of appeals affirmed petitioners' convictions in an unpublished memorandum opinion. Pet. App. A1-A9. In particular, the court concluded (*id.* at A7) that *McNally* did not require reversal of the convictions on the wire fraud counts. The court explained that the goal of petitioners' scheme "was to obtain government contracts by fraud and to thereby obtain money—i.e. contract payments—from the government by fraud" (*ibid.*). Accordingly, the court explained, "this is simply not a case in

which the government alleged a scheme to defraud someone of intangible rights unrelated to money or property" (*ibid.*).

The court of appeals (Pet. App. A4-A7) also rejected petitioners' claim that the contract language was ambiguous and could be clarified only by extrinsic evidence. Like the district court, the court of appeals concluded that the contract, "on its face, unambiguously requires disclosure of every place of performance" (*id.* at A7). Indeed, the court of appeals stated, "[t]he government introduced evidence showing that defendants did everything in their power * * * to conceal G.T.'s role in the production of the instruments" (*ibid.*).

ARGUMENT

1. Petitioners renew their contention (Pet. 5-12) that their convictions on Counts 2 through 5 cannot stand in light of *McNally*. They claim (Pet. 8-9) that their scheme merely deprived the United States of an intangible political interest and therefore did not constitute fraud within the meaning of 18 U.S.C. 1343. The court of appeals correctly rejected that argument, finding this case distinguishable from *McNally*.

McNally involved a scheme in which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay to the defendants a portion of the commissions it received from underwriting insurance companies. The defendants were charged and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Noting that "the Government now relies in part on the assertion that the petitioner obtained property by means of false representations," the Court concluded that the convictions

could not be upheld on that basis because "there was nothing in the jury charge that required such a finding" (slip op. 10-11).

In this case, by contrast, petitioners' scheme was a classic fraud through which petitioners used false representations and omissions of material facts in order to obtain money from the United States. As the court of appeals explained, the goal of the scheme, which was realized, "was to obtain government contracts by fraud and to thereby obtain money—i.e. contract payments—from the government by fraud" (Pet. App. A7). And, unlike in *McNally*, the jury here was instructed that a scheme to defraud "include[s] any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived" (*id.* at A12).

In any event, review by this Court is not warranted to resolve any question regarding the meaning of *McNally*. Congress recently amended the federal fraud statutes to provide that "the 'term scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history explains: "This section overturns *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988). Accordingly, the question whether the conviction in this case is inconsistent with *McNally* is an issue of diminishing importance.

2. Petitioners also claim (Pet. 12-16) that the contract language called only for disclosure of "first tier," and not "second tier," suppliers. According to petitioners, they had no "fair warning" (Pet. 12) that the failure to disclose the role of G.T., a second tier supplier, would subject them to criminal liability. As an initial matter, the meaning of a particular government contract does not merit

attention by this Court, at least in the absence of conflicting decisions as to the interpretation of the contract. In any event, petitioners' claim is devoid of merit.

As both courts below agreed, the contract is clear. It provides that bidders must specify where "work is to be performed," and states that "[t]he performance of any of the work contracted for in any place other than that named in the offer and any resulting contract is prohibited unless the same is specifically approved in advance by the Contracting Officer" (Pet. App. A4-A5). It further provides: "Subcontractors for all significant cost items (e.g., major components, forgings, subassemblies) shall be listed. Where items of foreign origin are involved, it is essential that the countries in which the items are produced or manufactured be identified." *Ibid.* As the district court found, "no rational or reasonable bidder or businessman can read * * * this contract without coming away from it with the feeling that the Government wants to know every place where the work is being done, regardless of who it is being done [by], where it is being done, whether it is being done by him, by his sub, or by a sub of his sub * * *. I do not believe that anyone reasonably can have any other interpretation * * *." C.A. App. 1952-1954. The court of appeals correctly affirmed the district court, finding that the contract "on its face, unambiguously requires disclosure of every place of performance" (Pet. App. A7).

Petitioners' efforts (Pet. 12-16) to find ambiguity by focusing on matters other than the plain language of the contract are not persuasive. Because the language of the contract is clear, petitioners get no benefit from a case such as *United States* v. *Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), in which the court indicated that "one cannot be found guilty of false statement under contract * * * when his statement is within a reasonable construction of the contract." The court also held in *Race* that "[t]o be

ambiguous[,] a contract must be susceptible of at least two reasonable constructions" (*id.* at 1120). Here, both lower courts correctly found that the contract is not subject to two reasonable interpretations.[3]

Any doubt that petitioners failed to understand that the DLA and VA contracts meant what they said is dispelled by their own actions. As the court of appeals recounted, petitioners directed G.T. to mark certain instruments "lightly," so that they could erase that company's markings. In addition, petitioners had G.T. mislabel the invoice for other instruments in order to hide the fact that the instruments had been manufactured in Pakistan (Pet. App. A4-A5). It is clear, therefore, that petitioners "did everything in their power * * * to conceal G.T.'s role in the production of the instruments" (*id.* at A7) precisely because they understood that the contracts prohibited G.T. from playing that role.

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[3] Petitioners' reliance (Pet. 12-13) on *Schweigert, Inc.* v. *United States*, 388 F.2d 697 (Ct. Cl. 1967), to support their contention that "subcontractor" does not include second-tier subcontractors, is misplaced. That case involved the interpretation of a liquidated damages clause and the meaning of the term "subcontractor" in that particular clause (388 F.2d at 700). The issue was whether the contractor should be excused from paying liquidated damages for delay because the delay had been caused by a second-tier subcontractor (*ibid.*). The Court of Claims declined to hold the contractor responsible for the actions of the remote subcontractor, which it could not control or monitor (*ibid.*). No similar issue is presented here. And, as the district court stated, no rational businessman could read the contract at issue without concluding that the government wanted to know the identity of all subcontractors (Pet. App. A5).

Petitioners also make a general reference to General Accounting Office decisions (Pet. 13, 16). None of the decisions previously cited by petitioners to the court of appeals addresses the issues in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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